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OCT 26 2001

No. 00-1073

Supreme Court, U.S.
FILED
OCT 12 2001
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UNSCANNED

IN THE

Supreme Court of the United States

OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, A/K/A OWASSO PUBLIC SCHOOLS; DALE JOHNSON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT; LYNN JOHNSON, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS ASSISTANT SUPERINTENDENT; RICK THOMAS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS PRINCIPAL,

Petitioners,

v.

KRISTJA J. FALVO, AS PARENT AND NEXT FRIEND OF HER MINOR CHILDREN, ELIZABETH PLETAN, PHILIP PLETAN, AND ERICA PLETAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* CAPITOL RESOURCE INSTITUTE, CITIZENS FOR BETTER GOVERNMENT, IN SUPPORT OF RESPONDENT

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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BRIEF OF *AMICI CURIAE* CAPITOL RESOURCE INSTITUTE, CITIZENS FOR BETTER GOVERNMENT, IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICI CURIAE* [1]

Capitol Resource Institute (hereinafter referred to as "CRI") is a nonprofit organization that develops positive

[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk. Pursuant to Rule 37.6, no counsel for a party authored this brief, in whole or in part, and no person or entity other than *amici curiae*, or their counsel, made a monetary contribution to the preparation or submission of this brief.

policies that affect culture and government in the State of California. CRI advocates on issues that affect families. They further provide a variety of services and products that educate the public on legislation and governmental policy. CRI provides commentary to more than 30 radio stations in California and offers expert analysis and commentary on key issues of public policy.

Citizens for Honest Government (hereinafter referred to as "CHG") is a California-based organization dedicated to protecting the family unit and to the development of policies and laws that serve this interest. CHG is a dba of Creative Ministries, a nonprofit organization.

SUMMARY OF ARGUMENT

Little could be more important to our Nation than the role that a child's parents play in the intellectual upbringing of a child. Indeed, the education of a child will mold the child's response to the world about them and comes to bear on the very health and vitality of this great Nation, now and in the future. This case brings to the forefront of constitutional analysis the issue of whether the Family Education Rights and Privacy Act [2] (hereinafter referred to as "FERPA") is a manifestation of the fundamental underpinnings of a society that begins and ends with individual families. If FERPA meets the charge of manifesting important public values, it follows that it should create or embody an enforceable right as against those who would violate its provisions. Logically speaking, this right is best realized through 42 USC § 1983.

More specifically, this case places this Court in the position of making a determination as to who are to be the primary participants in a child's education. The primacy to be given to parents in terms of having the right to be the "first on the scene" in terms of a child's academic performance derives

[2] 20 USC § 1232g, *et seq.*; 34 CFR 99.1, *et seq.*

from the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution. FERPA embodies these Constitutional principles and creates a uniform legal standard by which students, parents, and schools can guide their dissemination of information concerning, and discussions of, a student's academic progress.

FERPA, by logical operation, respects the fundamental right and liberty interest of a parent to be at the forefront of their child's education and to immediately address any problem with a child's grades or other recorded academic performance. When a teacher or student is allowed to call out the grade [3] of a student or to disclose other information protected under FERPA, without notice to a parent, a fundamental interference with the parent's penultimate right to address academic performance occurs. Once the grade is called out, or other academic performance information is disclosed, the parent is temporarily no longer in control of the educational upbringing of his/her child and the intellectual success and potential of the child becomes tainted by peers, the teacher, and the grading student. The parent is left in the uncomfortable position of having to "unring" a bell that they did not toll.

Petitioners' interpretation and application of FERPA contravenes constitutional precedent and, if condoned, would set a horrible precedent for this Nation. A ruling in favor of Petitioners would promote the idea that the state has a higher interest in the development of children than does the individual family unit. Indeed, the State would become divested from its origin in representative government and

[3] *Amici* herein do not argue the issue of whether a "grade" is a record in and of itself since other *amici curiae* and Respondents have addressed this issue in elaborate detail. This brief seeks to address the importance of FERPA to parental rights and the ability of parents to meaningfully participate in the education of their children.

become an uncontrollable Leviathan [4] in matters of education. If given this status, teachers and peers would play a primary role in evaluation of academic performance and the parent would enjoy substantially less than a secondary role in this process.

In order to fulfill its constitutional obligations [5] to parents, a school district must accept that a student's grades are "education records" under FERPA. Once the records are properly deemed to be "records," the power of a parent to address issues arising from those records can be reinstated and the parent can assume the role of a primary participant in addressing needed remedial reaction, if any, to a "bad grade."

Contrary to assertions by the Oklahoma Education Association, this case is not about an affront to the "free education" of this Nation's children. An "education" is truly guaranteed only where the parents are made an integral part of the process. "Education" involves an intimate relationship between students, parents and representatives of the State. Here, the Tenth Circuit has protected the right of parents to meaningful participation in the education of their children. As shown below, FERPA is the necessary gild on the existing structures of the right of privacy, the right to raise children, and the right to a free education.

Furthermore, this case is not about whether pedagogical traditions or customs are being unnecessarily challenged, as

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[4] Thomas Hobbes, *Leviathan* (pub. 1651) (1996, Ed. J.C.A. Gaskin, Oxford University Press, New York). See, also; Plato, *The Republic* (Trans. Benjamin Jowett, 1871) (1992, Quality Paperback Book Club, Random House, New York) pp. 59-62 [dialogue concerning the origin, notion, and individuals' relationship to the State]. *Also, see*; *Id.* at p. 285-286 [speaking to education and its relation to dialectical talent].

[5] *See, generally*; John Stuart Mill, *Utilitarianism, Liberty, and Representative Government* (pub. 1859) (1951, Dutton & Co., New York) pp. 178-179 [speaking to the co-equal obligations of education and the individual].

suggested by Petitioners. If the pedagogical traditions sought to be maintained by Petitioners do not bow before Constitutional principle, then they must cease to exist. Nowhere could this be more important than where the fundamental statutory and constitutional rights of parents and children are at stake. There is simply no pedagogical practice that could be declared important enough to overcome the fundamental and explicit civil rights of this Nation's parents.

While a school district might make the claim that the practices herein are relevant to correcting erroneous test responses, or necessary to creating an understanding of why a certain response is incorrect, the reality is that the pedagogical practice here actually prevents the parent from being truly able to respond to the *primary cause* of an incorrect test response. One need not be on the highest plane of academia to understand that incorrect responses on fairly drafted tests are attributable to the student's environment or to the conceptual and memory skills of the student. Indeed, the etiology of academic failure often rests at the very core of a student's humanity and the remedy to any problem in these areas first resides with the parents.

While it might make a teacher's grading tasks easier where students grade each others' papers, it does not make the job of the parent any easier. The parent is then left to combat the bad grade itself, the reaction of the child to the grade, the reaction of the grading student, the reaction of any students who heard the grade called out, the parent's own responsibility for any failures, the teacher, and school administrators.

Finally, and perhaps easily forgotten, is the fact that FERPA gives full credit to the intrinsic value of the privacy of a student's recorded academic performance. One can readily surmise that this, in part, is a recognition that a student's performance today is thought to be an incorruptible

investment [6] in their future as an American worker, parent, or professional.

Congress has, by enacting FERPA, insured that this investment will not be tainted by the corrosive factor of having unintended or unofficial third party interference. When the academic records of a child are protected, so too are the incremental investments in their future. These important investments are best represented and objectively determined by "grades" or other recorded measures of academic performance. Each grade achieved is a separate deposit which, if all goes well, will amount to a large investment in adult success. Any statute, including FERPA, which serves to protect these intangible investments must be carefully protected and given the power needed to fulfill its purpose. Petitioners' position would not provide these assurances.

I. PARENTS HAVE A DIRECT CONSTITUTIONAL STAKE IN THE EDUCATION OF THEIR CHILDREN: FERPA GUARDS THIS FUNDAMENTAL INTEREST FROM INTRUSION BY THIRD PARTIES

FERPA stands as a watchful sentry over the security of the relationship between parents and their children. As a matter of public policy, it insures that the State does not maintain more control than its constituent family units would be willing to give and places the highest value on a parent's responsibility to care for the educational development of a child. FERPA implicitly recognizes that interference with the ability to be responsible for the educational upbringing of

[6] *See, generally*; Allan G. Johnson, *Human Arrangements: An Introduction to Sociology* (2d Ed., 1989, Harcourt Brace Jovanich, New York) pp. 298-299 [with regard to the relationship between education and social mobility]. *Also, see*; John J. Macionis, *Society: The Basics* (3d Ed., 1996, Prentice-Hall, New Jersey) pp. 332-342 [discussion of academic standards and value of education to society].

one's child is just as important a right as that which allows one to beget a child. Simply stated, "freedom of personal choice in matters of family life is a fundamental liberty interest." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Accord; *Griswold v. Connecticut*, 381 U.S. 479 [recognition of fundamental rights in personal definitions of familial relations].

Moreover, this Honorable Court has specifically held that:

> "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925).

One can only assume that the "obligations" to be assumed by a child are those that are fulfilled by the child's intellectual and academic contributions toward the betterment of society. Inasmuch as one realizes that today's children are the Nation's future, it is also true that their upbringing is only an unfulfilled prophecy of that same future. Being so, it only makes sense that Congress and this Honorable Court do all possible to insure the security of each parent's role in this important process.

These very same sentiments were reverberated in *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166 (1943), wherein the Honorable Court stated that:

> "It is cardinal with us that the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include the preparation for obligations the state can neither supply nor hinder." *Also see, Parham v. J.R.*, 442 U.S. 584, 602 (1979).[7]

[7] *See, also, Stanley v. Illinois*, 405 U.S. 645, 651 (1972) [recognizing the interest of a parent in the management of the child's affairs]; *Quilloin*

Naturally, the phrase "custody, care, and nurture" of a child can only evoke a sense that a child's education rests at the very center of the fulfillment of parental responsibility. Indeed, it is a foregone conclusion that the nurturing of a school-age child will inevitably incorporate dialogue and decisive action relative to the child's academic performance. Without this uninterrupted dialogue, both the parent and the child risk the very success of the child as a functioning adult.

It also goes without saying that discussions about academic performance allow both child and parent to engage each other in a co-equal obligation and responsibility for the future of themselves and society as a whole. On the level of having a discernable obligation to society as a whole, familial dialogue about educational progress is one of the most important managerial functions any parent can assume and carry out. Ultimately, a parent's recognition of the importance of a child's academic performance is homage to the idea that each parent is responsible for contributing to the intellectual development of this entire Nation. Petitioners' desire to dilute the importance of a parent's role in addressing and remedying poor student performance will potentially lead to a negative effect on society.

Any mass failure to respect and carry out this function can lead only to a collective degradation of this Nation's future as a repository for intellectualism, academic integrity, and a

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v. Walcott, 434 U.S. 246, 255 (1978) [recognizing that parental rights are well established in American jurisprudence]; *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) [referencing the fundamental liberty interest of natural parents in the care, custody and management of their children]; *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) [parental rights to direct education of children]; *Doe v. Irwin*, 441 F.Supp. 1247 (Mich., 1985) [acknowledging rights of parents as deriving from First, Fifth, Ninth and Fourteenth Amendments to the Constitution]; *In the Interest of Cooper*, 631 P.2d 632 (Kan., 1981) [temporary losses of custody of children are grievous].

legitimate desire to consistently progress in all facets of academia. This is not a simple "slippery slope" argument. Fulfillment of the right and obligation to be a responsible parent recognizes that a student's grade today is a harbinger of the grade that America's future will earn. One cannot deny that FERPA has an effect on all American students. Moreover, one cannot deny that the collective performance of all students is necessary to the success of our Nation. It is oft said, for good reason, that "a chain is only as good as its weakest link."

In addressing the issue of the specific role of parents in the upbringing of their children, this Court has also stated that:

> "It is plain that the interest of a parent in the companionship, care, custody, and a management of his or her children 'come(s) to this Court with a momentum for respect lacking when appeal is made to the liberties which derive merely from shifting economic arrangements.' [cite]. . . .
>
> "The Court has frequently emphasized the importance of family. The rights to conceive and raise one's children have been deemed 'essential,' *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) . . . 'basic civil rights of man,' *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) . . . , and '[r]ights far more precious . . . than property rights.,' *May v. Anderson*, 345 U.S. 528 (1953) . . . ."

One of the best summarizations of these rights can be found in the following statement:

> "Among the most important of the liberties accorded this special treatment is the freedom of a parent and child to maintain, cultivate, and mold their ongoing relationship. . . .

> The constitutional interest in the development of parental and filial bonds free from governmental interference has many avatars. It emerges in a parent's right to control the manner in which his child is reared and educated and in the child's corresponding right not to have the content of his instruction prescribed by the state. . . . And, above all, it is manifested in the reciprocal rights of parent and child to one another's 'companionship.'" *Franz v. United States*, 707 F.2d 582, fns. 53-57 (D.C. Cir., 1983).[8]

The *Franz* decision simply underscores the importance of the litany of cases that this Court has decided in the area of parental rights and obligations. FERPA simply insures that these rights are respected on the level of each family unit. As shown below, this protection extends to a myriad of other important rights and the healthy growth and success of all children.

Finally, on a common sense level one can readily recognize that many a tear has been shed over a child's poor grades, and many happy victories have been enjoyed because of a student's high academic performance. The intimacy of these family moments cannot be understated. Bad academic performance and parental inability to effectively address the issue bear the risk of creating overall instability in the family. It is undeniable that a child's academic grades are important to a family's pride. Bad grades often result in family shame.[9]

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[8] Citing, in part; *Quilloin v. Walcott*, 434 U.S. at 255; *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972); *Stanley*, Id. at 405 U.S. 651; *Prince*, *Id.* at 166; *Parham*, Id., at 602-604; *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d.Cir., 1977).

[9] *See, generally*; Carl D. Schneider, *Shame, Exposure and Privacy* (1977, W.W. Norton & Co., New York)) pp. 29-55 [on a discussion of the nature of shame and the negative effect that it has on self image and relationships with other humans].

Indeed, the fundamental problem with how one might address a student's poor academic performance is even more compelling in assessing the degree of intimacy associated with a student's academic performance. All too often, the failure in performance may be due to learning disabilities, physical disabilities, and other objectively identifiable causes. Perhaps more important is the fact that, often, poor performance can be traced back to the parent. FERPA insures that the symptoms of such problems (e.g., recorded performance information) can be carefully addressed without jeopardizing the integrity of such an investigation or the self esteem of the child and parent. As a matter of public policy, the value of such a protection is beyond reasonable dispute. Indeed, this Court has already recognized that much of one's emotional enrichment derives from the ability to participate in "close ties" with others. See, generally; *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) [for the proposition that personal relationships are afforded constitutional protection].

II. FERPA GUARDS THE FUNDAMENTAL INTERESTS RECOGNIZED IN PARENTAL RIGHTS' JURISPRUDENCE

If it is true that the right to raise children is more important that just about any other right, it is necessary that a fundamental framework of statutory protections be erected around this right in order to assure its existence and vitality. FERPA does this by recognizing that there is a legitimate privacy interest in the academic performance of a child. 20 USC 1232g(b)(1). *Also, see*; *Falvo v. Owasso Independent School District*, 233 F.3d 1203, 1211 (10th.Cir., 2000). To the extent that the privacy interest here relates to the relationship between a parent, child, and school, it can be readily compared to other rights which emanate from the most intimate realms of family life.

Were the position of Petitioners to be adopted, school districts would essentially be given free reign to ignore the legitimate interest of a parent in privately addressing the effect, outcome, and plans of action to be taken in relation to the academic performance of a child. An appeal to common sense nets the conclusion that there is a significant difference in addressing something as important as poor academic performance in private, as opposed to the public humiliation that comes from a child being identified as a "failure" by peers, teachers, and other members of society.[10]

Even if the parent chooses not to address a bad grade immediately, "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." *Santosky*, supra, 455 U.S. at 753. In the present instance, FERPA recognizes this reality by implementing a consistent standard as to grading information disclosure and the parents's rights relative to such disclosure.

III. FERPA PROTECTS THE RIGHT TO SEEK PROFESSIONAL SUCCESS

To the extent that one is willing to accept the notion that a student's present day grades are the building blocks for possible admission to college or better job prospects, there is a fundamental interest in assuring that families be given a full and fair opportunity to address any problems concerning this issue.

In *Wilner v. Committee on Character*, 373 U.S. 96 (1963), this Court recognized that procedural due process required

[10] *See*; *Schneider*, supra.

"confrontation and cross-examination of those whose word deprives a person of his livelihood." *Id.* at 373 U.S. 103. Indeed, this is consistent with the idea that one does have the right, within their intellectual capacity and qualified experiences, to seek and enjoy a livelihood without unfair interference or deprivation by the State.[11] *See*, *generally*; *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-239 (1957); *Konigsberg v. State Bar*, 353 U.S. 252 (1957); *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956); *Wieman v. Updegraff*, 344 U.S. 183 (1952).

A child's education is, on many levels, the cornerstone of success in adult life. However, the difference between the rights recognized in *Schware*, and the other cited cases, is that the gateway to adulthood is controlled by one's parents. Parents help shape and motivate the direction in which a child moves in terms of moral upbringing, educational opportunity, and future professional success. Indeed, the parent acts as a surrogate for insuring that the rights of the child are vigilantly protected, and to guard against the possibility that the State could take action that unfairly interferes with the right of equal opportunity, to achieve professional success.

Finally, Petitioners have suggested that no private action should be permitted for seeking remedies to FERPA violations. Poignantly, this Court has rejected the notion that,

[11] *See*; Judith Wagner DeCew, *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology*, (1997, Cornell University) p. 11 [for the proposition that, "Everyone has a property right to 'his own person' and can extend it through sweat and labor. Thus what belongs to and is acquired by the self is private property and is distinctly separate from what is owned publicly or in common with all."]. E.g., to the extent that a student has "earned" a grade, they have, in some philosophical and real sense, established cognizable ownership over the grade and its byproducts. See, also; Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, FIRST AMENDMENT LAW HANDBOOK (1997, West Group, St. Paul, MN) pp. 557-594 [for the proposition that privacy has an economic value].

"[state action] aimed at . . . named individuals, which stigmatized their reputation and seriously impaired their chance to earn a living, could never be challenged in any court." To the contrary, it was concluded that, "Our Constitution did not contemplate such a result." *United States v. Lovett*, 328 U.S. 303, 314 (1946). This being so, the Tenth Circuit Court of Appeals has faithfully fulfilled its duty to uphold the Constitution and has empowered the Respondents with an ability to address academic performance problems without the threat of embarrassment, humiliation, or trepidation.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Tenth Circuit should be affirmed.

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